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Nos. 79-10 and 79-55

In the Supreme Court of the United States

OCTOBER TERM, 1978

THE UNIVERSITY OF TENNESSEE, ET AL., PETITIONERS

v.

RITA SANDERS GEIER, ET AL.

TENNESSEE HIGHER EDUCATION COMMISSION, PETITIONER

v.

RITA SANDERS GEIER, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 102a-143a) is reported at 597 F.2d 1056. The opinion of the court of appeals in a companion case, *Richardson* v. *Blanton*, Nos. 77-1622, 77-1624 (6th Cir. Apr. 13, 1979) (Pet. App. 83a-101a) is reported at 597

F.2d 1078. The district court's opinion (Pet. App. 37a-75a) is reported at 427 F. Supp. 644. A related order of the district court (Pet. App. 78a-81a) is not reported. Earlier opinions of the district court (Pet. App. 1a-32a) are reported at 288 F. Supp. 937 and 337 F. Supp. 573. An intermediate order of the district court (Pet. App. 33a-36a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on April 13, 1979. The petition for a writ of certiorari in No. 79-10 was filed on July 3, 1979. The petition for a writ of certiorari in No. 79-55 was filed on July 12, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in the circumstances of this case, the district court properly ordered the merger of two state universities located in the same city, when other efforts had proved ineffective to remedy the lingering effects of *de jure* racial segregation.

STATEMENT

A. State-wide de jure segregation

Until 1960 all of Tennessee's public institutions of higher education practiced *de jure* racial segregation (Pet. App. 3a-4a). The largest and oldest of these institutions, the University of Tennessee (UT), was created in 1794 and designated by the General Assembly as Tennessee's state university in 1879. UT

now has campuses at Nashville (UT-N), Chattanooga, Martin, Knoxville, and Memphis. UT-N began in 1947 as a facility at which students could take extension courses offered by UT-Knoxville. UT-N later offered courses for resident credit and in 1971 became a degree-granting institution with full campus status. From its inception, the University of Tennessee, including UT-N, admitted only white students. The racial requirements for admission were not formally abolished until 1960 (Pet. App. 4a). UT is governed by its own Board of Trustees.

Tennessee State University (TSU) was established in 1912 as the state's only public college for blacks. Until 1960 TSU admitted only black students (Pet. App. 4a). TSU is governed by the State Board of Regents, which also has jurisdiction over five other state universities and ten community colleges. Its campus is located less than five miles from UT-N (Pet. App. 104a).

B. The 1968 district court findings and order

In May 1968, five of the private respondents filed this suit in the United States District Court for the Middle District of Tennessee. They alleged that the dual system of higher education established by law in Tennessee had been perpetuated, in violation of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d. They sought to enjoin UT from constructing a new facility for the expansion of its program at UT-N (Pet. App. 2a). The United States intervened as a plaintiff and sought in addition an order requiring petitioners "to present

a plan calculated to produce meaningful desegregation of the public universities of Tennessee" (Pet. App. 3a).

The district court found that until 1960 Tennessee engaged in a *de jure* state-wide practice of separate and unequal racial segregation in the State's public higher educational institutions; that since 1960 an open admission policy has been in effect; that by the date of the district court's opinion in August 1968, the State had taken no affirmative steps whatsoever to desegregate the dual system; and that the dual system still existed, with the historically white institutions still overwhelmingly white and TSU still overwhelmingly black (Pet. App. 3a-10a). The district court ordered petitioners to submit a plan for the effective desegregation of Tennessee's higher education institutions, "with particular attention" to the conditions at TSU (*id.* at 10a). The court warned that "the failure to make [TSU] a viable, desegregated institution in the near future is going to lead to its continued deterioration as an institution of higher learning" (*id.* at 11a). The court refused, however, to enjoin the expansion of UT-N (*id.* at 8a). At that time, UT-N was not a degree-granting institution and had an enrollment of approximately 1,800, compared to TSU's enrollment of approximately 4,300. The court observed that "[t]here is nothing in the record to indicate that the University of Tennessee has any intention to make the Nashville Center a degree-granting day institution. On the contrary, * * * in its expansion program for the Nashville

Center, the University of Tennessee seeks only to provide * * * educational opportunity for employed persons of all races who must seek their education at night" (*id.* at 7a-8a). For this reason, the court did not "find that the proposed construction and operation of the University of Tennessee Nashville Center will necessarily perpetuate a dual system of higher education" (*id.* at 8a). The court thought it possible that "this additional educational facility in the Nashville area may play a part in the furthering of a unitary system" (*ibid.*).

C. The 1972 district court findings and order

In response to the district court's 1968 order, petitioners submitted a proposed desegregation plan in April 1969. The plan promised that the predominantly white institutions in the State would make continuing and expanded efforts to recruit black students and faculty members. It also pledged that TSU would intensify its efforts to recruit white students and faculty members by developing and publicizing academic programs that would attract students of both races (Pet. App. 15a, 41a). In addition, the plan announced that "the public institutions of higher education in the Nashville area would institute interinstitutional programs which would help achieve meaningful racial balance in enrollments" (*id.* at 15a; footnotes omitted).

Respondents filed objections to the plan, and, after a hearing, the district court entered an order stating that the plan was insufficiently specific and therefore

could not be approved or disapproved (Pet. App. 16a, 41a). The court directed petitioners to submit a report by April 1, 1970, describing precisely what had been done by that time to implement the plan (*id.* at 16a, 42a). On the basis of this report, the court found that substantial progress had been made on a state-wide scale in attracting black students to the public institutions of higher education in Tennessee (*id.* at 16a). The court further found that the performance of the predominantly white schools in attracting black faculty members was "somewhat more disappointing" (*id.* at 17a). Finally, the court observed that TSU had made "no gain" in integrating its student body (*id.* at 16a).

The private respondents moved for further relief, and the district court scheduled a hearing for June 1971. On the date set for the hearing, petitioners submitted a second desegregation progress report. Its contents were similar to those of the first such report submitted a year earlier. The only potentially significant new development reflected in the 1971 report was the arrangement of a joint engineering degree program between UT-N and TSU. The district court commented, however, that, because "the report [did] not clearly indicate either the number of students and faculty that would be involved or the amount of time each participating individual would spend at the respective schools," its impact on petitioners' desegregation effort could not be evaluated (Pet. App. 18a).

Following a hearing on the two desegregation reports, the district court concluded that "*with the exception of TSU*, [petitioners] are proceeding to dismantle their dual system of higher education, taken as a state-wide whole, at a constitutionally-permissible rate of speed" (Pet. App. 29a; emphasis in original). After reviewing the progress made outside the Nashville area, the court stated (*id.* at 19a):

> By way of contrast, the student body of Tennessee State is shown as 99.7 percent black during the academic year 1970-1971 and its faculty as 81 percent black during that period. Also of significance is the reported fact that the freshman class at Tennessee State for this year was 99.9 percent black.
>
> It is thus clear that Tennessee State remains, in all practical respects, a black institution, while the institutions in close proximity to it, as well as some other institutions in other parts of the State, remain in large part white. And, while it is clear that the desegregation progress of the predominantly white institutions has been steady, the phenomenon of a black Tennessee State, so long as it exists, negates both the contention that [petitioners] have dismantled the dual system of public higher education in Tennessee, as ordered by this court, and the contention that they are, in any realistic sense, on their way toward doing so.

The district court further found that the State's approach to desegregating TSU "has not worked and, indeed, appears to contain no prospect of working" (Pet. App. 29a). The court characterized the racial composition of TSU's student body as a "severe and

egregious" manifestation of the dualism resulting from Tennessee's unconstitutional *de jure* segregation (*id.* at 29a; see also *id.* at 33a). The court ruled that petitioners must carry out their affirmative duty to eliminate the lingering effects of the *de jure* system and that, if an open door policy alone is not sufficient to achieve that goal, "more radical remedies are required" (*id.* at 30a).

With respect to the manner in which desegregation of TSU could be accomplished, the district court observed that the evidence was uncontradicted that "white students would not be attracted to the school in any substantial numbers until there is what might be termed 'white presence' on the campus" (Pet. App. 30a). Accordingly, the court ordered petitioners to submit, by March 15, 1972, an interim plan providing at minimum for "the substantial desegregation of the faculty at TSU and the allocation to the campus of TSU of programs which will *ensure*, in the opinion of [petitioners], a substantial 'white presence' on the campus" (*ibid.*; footnote omitted, emphasis in original). The court recognized that compliance with this order would "not result in the adequate desegregation of TSU" and therefore directed petitioners also to study additional methods of desegregation and to report on such methods by August 1, 1972. In particular, the court ordered petitioners to consider "the feasibility or non-feasibility of a merger or consolidation of Tennessee State and U.T.-Nashville into a single institution" (*id.* at 31a; footnote omitted).

D. The 1977 district court findings and order

During the four and a half years following the district court's 1972 opinion, the court continued to monitor petitioners' efforts to eliminate the vestiges of *de jure* segregation at TSU and in the Tennessee higher education system. The history of this period is recounted in some detail in the court's most recent opinion (Pet. App. 44a-49a).

Petitioners filed an interim desegregation plan in March 1972, and in July and August of the same year they submitted their court-ordered reports on possible alternative methods of desegregation. UT-N stated that it believed cooperative programs with TSU were the best way to facilitate desegregation (Pet. App. 45a n.7). Petitioner in No. 79-55, the Tennessee Higher Education Commission (THEC), reported that competition with UT-N was TSU's biggest problem in attracting white students and that "[t]he only successful large scale desegregation of formerly black institutions has come by attracting adult, largely part-time commuting students, mostly enrolling in evening classes" (*id.* at 44a n.6, 54a-55a). As THEC acknowledged, this is precisely "the type of students that U.T. Nashville has been developed to serve" (*id.* at 55a). THEC concluded that, although merger of UT-N and TSU was not feasible in 1972, it "might at some point be the way to complete the desegregation process" (*id.* at 44a n.6). THEC advised that the exclusive allocation of particular educational programs, *e.g.*, teacher education, to TSU was a measure that should be taken immediately to

encourage white students to attend the nearly all-black school (*ibid.*). For its own part, TSU recommended merger with UT-N as the only way to achieve desegregation (*ibid.*).

Petitioners filed a further progress report in February 1974, and the district court found that improvements had been minimal since 1972, particularly at TSU (Pet. App. 46a). Accordingly, the court ordered petitioners to develop an interim plan for implementation during the 1974-1975 school year and a long-range plan to be submitted to the court in August 1974. The court also granted the other parties the right to offer alternative desegregation plans for consideration together with the one developed by petitioners.

In April 1974, petitioners and the State Board of Regents submitted their proposed interim plans. UT-N "reiterated [its] commitment to desegregate the Nashville area through the use of joint and cooperative programs" (Pet. App. 47a). THEC and the Board of Regents reported that the parties had been unable to reach agreement regarding exclusive program allocations or the development of cooperative programs or other joint action that would be designed to accelerate integration in Nashville. THEC and the Board therefore urged the district court to allocate one or more educational programs exclusively to TSU, beginning in the fall of 1974. The court accepted this recommendation and ordered that the offering of graduate education courses at UT-N be terminated for the next academic year and that

such courses be allocated exclusively to TSU (*id.* at 33a-36a). The court decided that any further relief should await the filing and evaluation of the long-term desegregation plans in August. The court warned, however, that its limited April 1974 order "should not be read as indicating that [petitioners] should take no further action immediately to continue the dismantling of the dual system" (*id.* at 34a).

Later in 1974, all parties filed long-range desegregation plans (Pet. App. 47a-48a). Petitioners "proposed in general that [they] continue to utilize joint, cooperative and exclusive program arrangements" (*id.* at 48a). The other plans submitted to the district court all recommended the merger of UT-N and TSU, with TSU as the surviving institution. While these plans were under consideration by the court, petitioners submitted two further progress reports describing developments subsequent to the filing of the long-range plans. On the basis of these reports, petitioners moved for summary judgment in June 1976 (*id.* at 49a). The district court denied the motion and scheduled a final evidentiary hearing.

An extensive hearing was held between September 20, 1976 and October 20, 1976. After carefully reviewing the history of the litigation and the evidence presented, the district court rendered a comprehensive opinion (Pet. App. 37a-75a), which contains the following findings:

1. "[T]he steady increase in black enrollment at the predominantly white institutions has continued" (Pet. App. 51a).

2. "Efforts to increase black faculty at these predominantly white institutions have been less productive. * * * However, the progression of black faculty since 1969 shows a small, but steady, increase" (*ibid.*).

3. "[T]he process of dismantling the dual system of higher education in Tennessee is complicated by the peculiar situation in Nashville. * * * [In 1977], over 60 years after the State's establishment of TSU as an institution for negroes and over 8 years after the Court's initial mandate to desegregate, TSU's student population is still overwhelmingly black" (*id.* at 52a-53a). Of the limited number of white students enrolled at TSU, many are "actually taking courses in off-campus centers," where more than 80% of the students are white (*id.* at 54a). By contrast to the situation at TSU, UT-N remains predominantly white, although it has grown since the filing of this suit "from a small extension program * * * to a degree-granting institution with full campus status (from 1,788 students to 5,828 students)" (*ibid*).

4. TSU and UT-N offer similar programs that "have remained predominantly one-race at each institution" (*id.* at 55a).

5. "[T]he existence and expansion of predominantly white UT-N alongside the traditionally black TSU have fostered competition for white students and thus have impeded the dismantling of the dual

system" (*id.* at 54a). "With TSU's black history and UT's prestige, this competition inevitably fosters dualism" (*id.* at 58a). As early as 1972, petitioner THEC recognized the competition for white students between TSU and UT-N (*id.* at 54a-55a).

6. "[T]he pattern of student enrollment in Nashville has been that white students have overwhelmingly enrolled at UT-N, as part-time evening students, and that black students have overwhelmingly enrolled at TSU as daytime students. This pattern of enrollment does not appear to be just coincidental but appears to be a vestige of the former state-imposed dual system of public higher education in the State of Tennessee. Moreover, even if the average student profile at UT-N shows that those students are older and are employed, these are the kind of white students that * * * TSU must attract if it is to prosper" (Pet. App. 56a).

7. During the nine years since the beginning of this litigation, petitioners' desegregation plans "have not produced the desired result" (*id.* at 58a). "From the first plan filed by [petitioners] through the Long Range Plan now in effect, [petitioners] have sought to achieve the ordered progress at TSU by utilizing certain joint and cooperative programs between UT-N and TSU * * * and by providing exclusive program assignments for the two Nashville institutions. The record clearly shows that this approach 'has not worked and, indeed, appears to contain no prospect of working'" (*id.* at 58a-59a). The factual details supporting this finding are as follows:

(a) There have been only two joint degree programs between UT-N and TSU. One, the undergraduate program in general engineering, began in 1971 and is an admitted failure. The other, the master's degree program in public administration, began in 1976, and its prospects for success are not good (Pet. App. 59a-60a).

(b) There have been no cooperative academic credit programs (*i.e.* "programs which make it easier but do not require students to take work on both campuses") involving both UT-N and TSU (*id.* at 60a).

(c) Programs exclusively assigned to TSU during the day, with UT-N being permitted to offer them only in the late afternoon and evening, have remained "overwhelmingly black at TSU * * * and predominantly white at UT-N" (*id.* at 61a). "The only truly successful exclusive program is the graduate teacher education program which was given exclusively to TSU by Court Order on April 19, 1974, because an agreement to do so could not be reached among the parties. The record shows that the exclusive graduate teacher education program at TSU is the only program which has been able to attract a substantial number of white students" (*id.* at 62a; footnote omitted).

(d) "[T]he States's approach utilizing joint, cooperative and exclusive program planning has not eliminated the competition between UT-N and TSU, and past failures leave little hope for future progress. The hope for future progress is further dimmed by

the historical inability of the defendants to agree among themselves as to the proper course of action, and by the reluctance of the politically powerful University of Tennessee to take significant steps to eradicate dualism in Nashville" (*id.* at 63a).

8. "Since joint, cooperative and exclusive programming has not resulted in progress toward eliminating the dual system in Nashville, * * * the only reasonable alternative is the merger of TSU and UT-N into a single institution under a single governing board" (Pet. App. 66a-67a).

9. Merger is feasible and is likely to occur eventually even in the absence of judicial intervention (*id.* at 67a-71a). "[T]he expert witnesses all believe that merger is an acceptable approach for desegregating the Nashville area, with most of the expert witnesses believing that merger is the best long range solution. * * * [M]ost of the expert witnesses and several of the defendant officials believe that eventually there will be one institution in Nashville. Consequently, the evidence overwhelmingly supports merging the two Nashville institutions under one governing board" (*id.* at 71a).

10. "[M]erger does not exceed what is necessary to eliminate the effect of the statutory [segregation] scheme. Eight years under the State's method is proof that a stronger remedy is required. Certainly, it cannot be argued that TSU would be overwhelmingly black today if it had not been established as an institution for negroes. Merger is a drastic remedy,

but the State's actions have been egregious examples of constitutional violations" (Pet. App. 73a).

On the basis of these findings and the entire record, the district court ordered that UT-N and TSU be merged into a single institution under the governance of the Board of Regents, the merger to be completed by July 1980. The court granted the Board of Regents 75 days within which to formulate a plan for merger, with the assistance of a six-person advisory committee, to be appointed in equal numbers by the President of TSU and the Chancellor of UT-N (Pet. App. 77a).

On May 11, 1977, the Board filed a detailed merger plan providing for the merger of TSU and UT-N by July 1, 1979. The plan was designed to establish a single public-supported institution of higher education offering a broad curriculum to both day and evening students and to accomplish this objective with maximum participation of the various constituencies involved and minimum disruption of the education process (Pet. App. 116a-117a).

The district court rejected challenges to the implementation of the Board of Regents' plan (Pet. App. 78a-81a). The court explained (*id.* at 80a-81a):

> The court purposely declined to specify the details of the merger. After determining that merger was the necessary remedy in this case, and ordering that it be done, the details were left to the educators of the Board of Regents. The plan submitted by the Board was timely filed and provides for the merger of the institutions by July 1, 1980. Consequently, it does not violate the Judgment. Absent a stay, the plan should be put into effect.

E. The court of appeals proceedings

After a thorough analysis of the district court's factual findings and remedial order, the court of appeals affirmed in all respects (Pet. App. 102a-143a). The court rejected petitioners' contention that the district court's finding of liability was based solely upon the racial composition of TSU and not upon a proper finding of an underlying constitutional violation (*id.* at 117a-118a, 123a).[1] The court of

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[1] The court stated (Pet. App. 123a):

> We conclude that the district court did not base its finding of a constitutional violation on the mere existence of one identifiably black university in the entire system. As the defendants point out, the Supreme Court held in *Swann* [v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971)], the existence of a "small number of one-race, or virtually one-race, schools within a district is not in and of itself the mark of a system that still practices segregation by law." 402 U.S. at 26. The district court in the present case did not base its finding on the existence of predominantly black TSU "in and of itself." To the contrary, Judge Gray specifically found that TSU required special attention because it was "the heart of the dual system." Further, he found that TSU continued to be predominantly black long after the open admissions policy was instituted because of a failure by state officials to take meaningful actions to facilitate its desegregation while acting with respect to UT-N in ways which impeded the required dismantling of the dual system. There was no failure to articulate the standard by which the district court determined that a constitutional violation existed in Nashville and no fatal inconsistency in his findings, as contended by the defendants.

appeals endorsed the district court's findings that TSU was the "heart" of Tennessee's *de jure* dual system and that in Nashville "the vestiges of state-imposed segregation [are] clear and undiminished in reality" (*id.* at 118a, 121a-122a). The court held that the affirmative duty to dismantle a well-entrenched dual system "applies to public higher education as well as to education at the elementary and secondary school levels" (*id.* at 119a). The court also sustained the district court's conclusion that "[w]here an open admissions policy neither produces the required result of desegregation nor promises realistically to do so, something further is required" (*id.* at 123a).

The court of appeals ruled that the merger remedy ordered by the district court is a proper exercise of the court's equitable power. The court fully considered and rejected petitioners' contention that the form of relief ordered is either unlawful or an abuse of discretion (Pet. App. 124a-130a). On the contrary, the court held, the merger remedy is consistent with the equitable principles stated in *Milliken* v. *Bradley*, 433 U.S. 267, 280-281 (1977) (*Milliken II*). Applying those principles, the court concluded (Pet. App. 125a) that

> [t]he merger remedy was related to the condition found to offend the Constitution. This "condition" was failure to dismantle a dual system. The core of the problem was found to be the inability of TSU to attract a "white presence" to its campus because of the competition of

> UT-N for students in the Nashville area. This competition would not have been so formidable if UT-N had remained a non-degree-granting extension center. Its expansion to a four-year degree-granting institution greatly inhibited the efforts to desegregate TSU. Further, the remedy of merger effectually restores the victims of discrimination to their rightful place. The black students had a constitutional right to attend a unitary system of higher education, which was denied them by state action. The merger will permit TSU to expand as a comprehensive urban university, offering educational opportunities to students of traditional college age and older working students in a desegregated setting. The nature of the remedy does not exceed the nature and scope of the violation.

Finally, the court of appeals rejected petitioners' contention that the merger order violates the principles enunciated by this Court in *Milliken* v. *Bradley*, 418 U.S. 717 (1974) (*Milliken I*). The court held that the ultimate responsibility for the actions of both TSU and UT-N rests with the State of Tennessee, which operated both institutions as part of a dual system (Pet. App. 129a-130a). Accordingly, "the district court did not exceed its powers in directing that UT-N be merged with TSU even though the two institutions have been under the control of different state-wide boards" (*id.* at 129a). The court of appeals observed that both the UT Board of Trustees and the State Board of Regents have state-wide jurisdiction and therefore the concern expressed

in *Milliken I* regarding local community control over public schools is inapplicable (*id.* at 127a). Moreover, the court said, both the UT Board and the Board of Regents played a role in operating and perpetuating the *de jure* system, and for that reason an "interboard" remedy is appropriate under the standards announced in *Milliken I* (*id.* at 127a-129a).

Judge Engel agreed that the facts warranted relief but dissented from the affirmance of the remedial order merging TSU and UT-N (Pet. App. 132a-143a). He stated that in his view the appropriate relief would be "to confine UT-N to those courses and activities which were offered prior to the expansion in 1969" (*id.* at 142a). If UT-N were thus "enjoined from encroaching upon programs which are designed to attract white students," Judge Engel thought, TSU's desegregation efforts would be more likely to meet with success (*id.* at 143a).

Petitioners moved to stay the mandate of the court of appeals and to stay the merger orders. The court of appeals denied the motion, with Judge Engel dissenting from the refusal to stay the merger of UT-N and TSU. On June 18, 1979, this Court denied petitioners' request for a stay pending the filing and disposition of petitions for a writ of certiorari (Nos. A. 1026, A. 1051).

ARGUMENT

The petitions for a writ of certiorari should be denied. The decisions and concurrent findings of the lower courts correctly apply well-settled legal principles and are fully consistent with the opinions of this Court. There is no conflict among the courts of appeals on the questions presented, and further review is not otherwise warranted.

1. Petitioners argue vigorously (79-10 Pet. 17-22; 79-55 Pet. 19-21) that the district court found a constitutional violation based solely on the continued existence of a predominantly black institution. This inaccurate characterization of the district court's holding was flatly rejected by all three judges on the court of appeals panel (Pet. App. 117a-118a, 123a, 132a-134a). It does not accord with the facts.

In 1968 the district court found that Tennessee had by law created a dual system of higher education (Pet. App. 3a) that "ha[d] not been effectively dismantled" (*id.* at 5a). The court ordered petitioners to submit a plan to dismantle this dual school system, with special emphasis on the conditions at Tennessee State University (*id.* at 10a). Under this Court's decision in *Green* v. *County School Board*, 391 U.S. 430, 439 (1968), petitioners were then obliged to come forward with a plan that "promise[d] realistically to work" immediately to fulfill their "continuing 'affirmative duty to disestablish the dual school system' " of public higher education in Tennessee. *Columbus Board of Education* v. *Penick*, No. 78-610 (July 2, 1979), slip op. 10.

. Petitioners proposed to meet their affirmative constitutional duties by making indefinite promises to establish joint, cooperative, and exclusive programs between UT-N and TSU (Pet. App. 107a-108a). Four years later, the district court found that this approach had not worked and ordered petitioners to implement more effective remedies (*id.* at 29a). The ensuing five years witnessed a series of plans again limited to a generalized commitment to joint, cooperative, and exclusive programs. The plans were further hampered in their effectiveness by disagreements among the defendants. In 1977, the district court found that petitioners' expansion of UT-N since the filing of this suit "impeded the dismantling of the dual system" (*id.* at 54a). In addition, the court found that petitioners knew no later than 1972 that UT-N competes for white students with TSU and that expansion of UT-N would have the predictable effect of slowing TSU's desegregation efforts (*id.* at 54a-55a). The district court ruled again, as it had in 1972, that the dual system of education had not been dismantled and that petitioners' "past failures [left] little hope for future progress" (*id.* at 58a-59a, 63a). The court's decision to require merger thus does not rest solely on TSU's racial composition, as petitioners contend. Rather, petitioners' actions impeding desegregation and their persistent failure to meet their affirmative obligations forced the district court to adopt a remedy that will finally eliminate the unconstitutional effects of *de jure* segregation (*id.* at 73a). The court of appeals recognized

that the desegregation measures developed by petitioners were inadequate and therefore affirmed the district court's judgment in its entirety.

2. Emphasizing that TSU and UT-N are governed by different legal entities (the State Board of Regents and the UT Board of Trustees), petitioners assert (79-10 Pet. 27-31; 79-55 Pet. 22-25) that the district court erred in ordering merger of the two schools. Petitioners maintain that the district court failed to find a constitutional violation in the establishment and operation of UT-N and therefore should not have imposed a remedy involving UT-N. But this is not a case in which petitioners' liability is at issue. Both the district court and the court of appeals found that Tennessee had purposefully discriminated against black students by operating a *de jure* system of higher education including both TSU and UT-N (Pet. App. 3a-5a, 103a-104a, 129a). That finding is undisputed. Because the overwhelmingly black character of the current TSU student body is a vestige of the unconstitutional *de jure* system, the only question that remains concerns the appropriate remedy for the lingering effects of past discrimination.

UT-N cannot insulate itself from the remedial process merely by citing the different governing bodies that Tennessee has created to operate the State's system of public higher education. As the court of appeals correctly explained, the State bears the responsibility for dismantling the dual system, and it cannot relieve itself of that obligation simply by

distributing administrative authority to two or more legal entities. In the court of appeals' words (Pet. App. 129a-130a; emphasis in original):

> The Fourteenth Amendment provides that *no state* "shall deprive any person within its jurisdiction of the equal protection of the laws." It was the State, acting through its legislature, which required for many years that black persons pursuing an education in a public institution of higher education be isolated from white persons engaged in the same endeavor. The colleges and universities under the jurisdiction of the UT Board as well as those under [the State Board of Regents] were operated as part of a dual system. Both boards and all the public institutions are instrumentalities of the State. After the doors of all institutions were opened to all qualified applicants without regard to race, the effects of the previous segregation lingered. TSU remained an almost totally black university in student body, faculty and administration. Its efforts to desegregate were directly affected by competition from the expanding UT-N. Since the policies and actions of the UT Board contributed to the perpetuation of the dual system there was no legal reason why it should not be required to participate in the court-ordered plan for dismantling that system.

Contrary to petitioners' contentions, this holding is entirely consistent with this Court's relevant precedents establishing (1) the continuing affirmative duty of proven discriminators to remedy their misdeeds (see, *e.g.*, *Columbus Board of Education* v. *Penick*, *supra*; *Dayton Board of Education* v. *Brinkman*, No. 78-627 (July 2, 1979); *Green* v. *County School Board*, 391 U.S. 430 (1968)) and (2) the equitable power of the federal courts to eliminate the vestiges of *de jure* segregation (see, *e.g.*, *Milliken* v. *Bradley*, 433 U.S. 267, 280-281 (1977) (*Milliken II*)) and to prevent interference with that process (see, *e.g.*, *United States* v. *Scotland Neck City Board of Education*, 407 U.S. 484 (1972); *Wright* v. *Council of City of Emporia*, 407 U.S. 451 (1972)). And, as the panel majority recognized (Pet. App. 128a), the district court's remedial order is not inconsistent with *Milliken* v. *Bradley*, 418 U.S. 717 (1974) (*Milliken I*).

In the first place, it is not clear that *Milliken I* applies to the facts of this case. *Milliken I* involved an order requiring the merger of independent suburban school districts and the Detroit school system, despite the fact that the suburban districts had not engaged in any illegal discrimination and despite the lack of proof that the constitutional violations committed in the operation of the Detroit school system had had any significant effects on the suburban districts. See 418 U.S. at 745, 748; *Hills* v. *Gautreaux*, 425 U.S. 284, 294 (1976). Here, by contrast, "the State, acting through its legislature," operated TSU and UT-N as part of the *de jure* segregated system (Pet. App. 129a). Unlike the suburban school boards in *Milliken I*, the boards of TSU and UT-N are the very instrumentalities that the State employed to perpetrate the constitutional wrong. In addition, the constitutional violation affected the operations of both entities. The "inter-

board" remedy in this case is thus not comparable to the interdistrict remedy in *Milliken I*, where truly independent political entities not responsible for or affected by the constitutional violations were ordered merged.

In any event, *Milliken I* fully supports an "interboard" remedy in this case, because both TSU and UT-N committed constitutional violations in the operation of the dual system (Pet. App. 3a-5a, 103a-104a, 129a). Moreover, the actions of UT-N, both before 1960 and more recently, "have been a substantial cause" of segregation at both UT-N and TSU (*id.* at 54a-55a; see 418 U.S. at 745).[2]

3. Petitioners argue (79-10 Pet. 20-21, 22-23; 79-55 Pet. 11-16) that the Court should grant review in this case because the lower courts have ordered the merger of institutions of higher education, rather than elementary or secondary schools. But a difference between the academic levels of the institutions involved does not imply any legally significant distinction between the present case and earlier school desegregation precedents. No novel question of federal law arises from the university context.

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[2] Petitioners' contention (79-10 Pet. 24-25) that the merger order in this case is defective because the district court failed to order comparable relief in other portions of the State is without merit. Whether or not the district court could have ordered more stringent relief in the remainder of Tennessee, the remedial order actually entered was properly tailored to the unique circumstances existing in Nashville, the only location in the State where the expansion of one public university, UT-N, was found to have impeded desegregation of another, TSU.

The court of appeals correctly recognized that "a district court is controlled by general principles of equity in fashioning a desegregation remedy" (Pet. App. 124a). This Court has never suggested that those principles vary in their statement or application depending on the level of educational institution concerned. Rather, a district court framing a remedial order is required in each case to ensure (1) that the nature of the desegregation remedy fits the nature and scope of the constitutional violation (*Milliken II, supra*, 433 U.S. at 280); (2) that the remedy is designed "to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct" (*Milliken I, supra*, 418 U.S. at 746); and (3) that the remedy "take[s] into account the interests of state and local authorities in managing their own affairs, consistent with the Constitution" (*Milliken II, supra*, 433 U.S. at 281).

Petitioners have not identified any persuasive justification for establishing different remedial rules for educational institutions above the secondary level. This Court's summary treatment of the lower courts' decisions in *Alabama State Teachers Ass'n* v. *Alabama Public School and College Authority*, 289 F. Supp. 784 (M.D. Ala. 1968), aff'd *per curiam*, 393 U.S. 400 (1969), and *Norris* v. *State Council of Higher Education for Virginia*, 327 F. Supp. 1368 (E.D. Va.), aff'd *per curiam sub nom. Board of Visitors of the College of William & Mary in Virginia* v. *Norris*, 404 U.S. 907 (1971), supports the

court of appeals' conclusion (Pet. App. 120a-121a) that the same principles apply in higher education cases. Moreover, the summary treatment of these cases belies petitioners' assertion that the "importance" of the question presented here compels review by this Court.

Petitioners' emphasis on the importance of "freedom of choice" in the higher education context (79-10 Pet. 19; 79-55 Pet. 13-14) ill suits the factual background that confronted the courts below. For decades Tennessee operated a dual system of education at all levels (Pet. App. 3a-4a). Under such circumstances, a remedial plan relying solely on "freedom of choice" presents both black and white students with a "loaded game board," cf. *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 28 (1971), because it places on them the burden of rectifying an ingrained tradition of prejudice produced by years of state-imposed segregation. Furthermore, the record in this case conclusively demonstrates that over a period of 17 years Tennessee's freedom of choice plan failed to dismantle the "well-entrenched" dual system of public higher education in Nashville. Cf. *Green* v. *County School Board*, *supra*, 391 U.S. at 437. The record also shows that petitioners knowingly took action that impeded desegregation efforts in Nashville and consistently failed to fulfill their obligation to implement remedies that would accomplish the required conversion to a unitary system. And, in any event, the merger remedy adopted by the district court does not restrict

any student's freedom of choice in the sense that assignment of pupils to particular schools does. Petitioners' recitation of the "freedom of choice" litany is a spurious attempt to inject into this litigation an educational policy issue that does not exist. The simple fact is that, in light of previous unsuccessful desegregation efforts, merger has been found to be the only means by which the district court can hope to eliminate the vestiges of *de jure* segregation in the public higher education system of Nashville.

4. In the final analysis, the outcome of this case depends on the accuracy of the factual findings made by the district court and approved by the court of appeals. The central feature of the court of appeals' holding is that the district court properly found that the actions of UT-N impeded the desegregation of TSU and that the unlawful segregation of TSU could be remedied only by a merger with UT-N. This Court has often stated that it will not "undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *Graver Mfg. Co.* v. *Linde Co.*, 336 U.S. 271, 275 (1949), and cases cited therein. See also *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635 (1967). Petitioners have made no such showing here.

The merger remedy was ordered by the district court as a last resort and only after the most deliberate consideration of all the facts in the case. The district court devised its own remedy only when it became clear beyond doubt that petitioners had not

taken and would not take meaningful steps to discharge their affirmative constitutional obligations. The remedy the court adopted is analogous to the pairing of particular schools in a dual system—a remedy that has repeatedly been upheld as a proper tool of desegregation in appropriate circumstances. See, *e.g.*, *Swann* v. *Charlotte-Mecklenburg Board of Education*, *supra*, 402 U.S. at 27-29; *Green* v. *County School Board*, *supra*, 391 U.S. at 442 n.6. Here, the institutions merged offer the same basic educational programs and are located less than five miles apart. The merger remedy was tailored closely to the nature of the violation found. The court of appeals correctly held that the district court properly evaluated the evidence before it and did not abuse its discretion in entering a decree that will eliminate the lingering effects of an egregious constitutional violation.[3]

[3] In our view, the remedy suggested by the dissenting member of the court of appeals (Pet. App. 142a), which was not proposed by any party, is clearly less desirable than merger. A return of UT-N to its pre-1969 curriculum would not directly remedy the dualism in Nashville that the expansion of UT-N helped foster. Moreover, such relief would be less equitable and more disruptive than merger. In a merged institution, students in Nashville can attend the same courses previously offered, and faculty tenure and other employment interests will be honored. Neither would necessarily be the case under Judge Engel's proposal.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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